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Article (Published Version)

Eltringham, Nigel (2017) ‘The judgement is not made now; the judgement will be made in the future’: ‘politically motivated’ defence lawyers and the International Criminal Tribunal for Rwanda’s ‘historical record’. Humanity. ISSN 2151-4364

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# Humanity

## **“The Judgement Is not Made Now; The Judgement Will Be Made in the Future”: “Politically Motivated” Defence Lawyers and the International Criminal Tribunal for Rwanda’s “Historical Record”**

**Nigel Eltringham**

July 13, 2017

In December 2014, after twenty years of operation, the International Criminal Tribunal for Rwanda (ICTR) delivered its last appeal judgment. Established in November 1994 by the United Nations Security Council, the ICTR was tasked with putting on trial any person accused of committing the following in Rwanda in 1994: genocide (as defined by the 1948 UN Convention for the Prevention and Punishment of the Crime of Genocide); crimes against humanity (a widespread or systematic attack on a civilian population) and “war crimes” (Article 3 common to the 1949 Geneva Conventions). With its seat and four courtrooms in Arusha, Tanzania, the ICTR indicted ninety three individuals; of whom sixty two were convicted; fourteen were acquitted; ten were referred to domestic jurisdictions; two indictments were withdrawn; two died prior to or during the trial; and three remain “at large.”

In December 2010, the UN Security Council<sup>1</sup> had created the Mechanism for International Criminal Tribunals (MICT) tasked with continuing the “jurisdiction, rights and obligations and essential functions” of the ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) including the tracking and prosecution of remaining fugitives, appeals proceedings, retrials, trials for contempt of court and false testimony, judgment review, protection of witnesses and victims, the enforcement of sentences and assistance to national jurisdictions. The MICTR is also responsible for the ICTR archives which contain the transcripts of witness testimony, audio-visual recordings and documents entered as evidence. Throughout the ICTR’s existence those tasked with speaking on behalf of the ICTR stated that such a “historical record” composed of the “testimony of victims, testimony of accused, documentary evidence, video recordings and audio recordings” was among “the most basic and most important of the Tribunal’s achievements”<sup>2</sup> and that the “ICTR Archives are perhaps the best historical narrative of the genocide and hold a great potential for re-imaging Rwanda based on the truth about the past.”<sup>3</sup>

Such claims resonate with a long-standing debate regarding the relationship between trials for mass atrocity and the writing of history. In their assessment of the International Military Tribunal (Major War Criminals) at Nuremberg (1945-46), participating lawyers and judges observed the positive role trials played in establishing a historical record, that the trial would provide “an authoritative and impartial record to which future historians may turn for truth and future politicians for warning”<sup>4</sup> and that “Without the trial, the scene of horror would have taken years to reproduce in all its dreadful detail.”<sup>5</sup> For these lawyers and judges justice and preserving history could be pursued simultaneously. Likewise, Gideon Hausner, the prosecutor in the trial of

Adolf Eichmann in Jerusalem (1961-62), wrote in his memoirs that in “any criminal proceedings the proof of guilt and the imposition of a penalty ... are not the exclusive objects.”<sup>6</sup> For this reason, Hausner called witnesses whose testimony was only marginally related to the alleged actions of Eichmann. Having observed the trial, Hannah Arendt<sup>7</sup> articulated a contrasting position, that using the trial to establish “a record of the Hitler regime which would withstand the test of history” would “detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”

Recent reflection on international criminal trials has tended to soften the binary promoted by Arendt. Drawing on research at the ICTY, the ICTR and the International Criminal Court (ICC), Richard Wilson argues that the “legal testing” that takes place in the course of a trial means that “historical points of view are all aired openly and are all challenged robustly.” Similarly, Jenia Iontcheva Turner found that defense lawyers in international trials also believed that a contested trial produced a more accurate historical record because it tested the prosecution’s case.<sup>8</sup>

Whereas Arendt’s position implies an either/or (granting primacy to either a historical record or individual prosecution), many of the lawyers and judges with whom I spoke during ethnographic fieldwork at the ICTR (2005-2007) accepted, like their forebears at Nuremberg, that both could be pursued simultaneously.<sup>9</sup> A prosecution lawyer exemplified this position, “I see concentric circles ... if the circle of law establishes truth, then it preserves history. As they say “If it quacks and flaps like a duck ...”” Such a position corresponds with Austin Sarat and Thomas Kearns<sup>10</sup> suggestion that while the purpose of a trial is not “first and foremost memorial,” there is always a “relentless insistence on record keeping and remembrance.” While the position adopted by Arendt offers a stark choice, many legal practitioners at the ICTR suggested a “middle ground” was possible, in which a historical record as inevitable, and valued, result could exist alongside the “core” objective of prosecution.

The question remains, however, whether the attention given to “law’s main business” has obscured a more important question: what if the “historical record” (transcripts, documents) preserved in the course of a trial is used to construct historical narratives at odds with judgments? The ICTR’s “historical record” was only ever spoken of as an achievement by those tasked to speak on behalf of the ICTR as institution, the Prosecutor’s spokesperson observing “Researchers and historians may find the records useful for refuting genocide ideology while establishing an authentic public historical record.”<sup>11</sup> This statement presumes that the “historical record” of trial archives will only be utilized in ways that correspond with judgments. This presumption was made explicit by an Assistant Legal Office (ALO) at the ICTR when I asked him whether he considered the archive or the judgments to be the “historical record.” He replied, “A future researcher cannot just read an exhibit [in the archive] because they would be unable to assess credibility. Future researchers should always read the judgments before they use any document.” This comment’s naivety is two-fold; first it assumes that “future researchers” would be so compliant; and, second, that only “researchers” (defined according to what criteria) would consult the archive.

An indicator that “future researchers” will not be compliant is illustrated by Danny Hoffman, an anthropologist who published a version of the expert report he had prepared for the defense in

the 2005 trial of the leaders of the Civil Defence Forces Militia at the Special Court for Sierra Leone. Hoffman argues that:

I believe the Special Court transcripts and archive will be the primary historical record of the war. ... A great deal of this material is freely available online. In my view, much of the Prosecution's interpretation of that material was inaccurate. My report and the current article are therefore meant as a dissenting voice in the CDF archive.<sup>12</sup>

Hoffman indicates the value he places on the court's archive, but his interpretation of that archive is contrary to that promoted by the prosecution. While Hoffman undoubtedly belongs to the anticipated category of "future researchers" envisaged by the ALO, his "dissenting voice" raises the specter of more extreme dissent in the uses to which a trial's "historical record" could be put.

Such dissent was apparent while ICTR trials were in progress in the way that "politically motivated" defense lawyers promoted the "historical record" as something more important than a judgment. Defense lawyers at the ICTR could be roughly divided into two loose groupings which can be described, employing terms used by defense lawyers themselves, as the "politically motivated" (who publicly criticized the ICTR for its partiality) and "technicians" (concerned only with the defense of their client). A defense lawyer, for example, describing himself as a "technician" distinguished himself from "politically motivated people." Defense lawyers described as "politically motivated" were often associated with the *Association des Avocats de la Defense* (ADAD), described by one defense lawyer as being "full of politically-motivated and self-promoting nitwits."

From "technicians," I encountered generally positive assessments of the ICTR. The defense lawyers described as "politically motivated," however, voiced more complex evaluations of the ICTR. On one hand, a defense lawyer (among those described as "politically motivated" by colleagues) told me that that the ICTR was "just a bunch of white people condemning Africans to show what will happen if they do not toe the line," but he also conceded that "because the trials are adversarial it means that we can present to the public some reality in some small way, more and more stuff has come out."

The position held by this "politically motivated" lawyer, that although the ICTR was a "Victor's court" (for having not indicted members of the Rwandan Patriotic Front, the ruling party in Rwanda<sup>13</sup>) there were elements of the trials that were redeemable, was one I encountered with other defense lawyers. During a conversation with two defense lawyers, they described the ICTR as a "victor's court" and "a persecution of Hutus." The two lawyers, however, tempered their assessment by describing the trials as a mechanism to preserve history:

The accused persons say, and keep saying, we shouldn't give up. We are putting everything on record for history. The truth will come out one way or another. Put everything on the record and then later our children will decide on the truth. People will be able to read and make their own decisions in the future. We have all the records. The judgment is not made now; the judgment will be made in the future.

Like their colleague (“more and more stuff has come out”) these defense lawyers saw trials as a mechanism to establish a “true” history of the 1994 genocide. Although condemning the ICTR as a “victor’s court” these defense lawyers also spoke of their clients’ commitment to the trial as an opportunity for creating a “record for history.”

The idea that ICTR trials, whatever their shortcomings, were redeemable as a mechanism to record “history” was conveyed by other defense lawyers. A defendant had told his lawyer, for example, “We appreciate what you have done, that our children’s children will know the truth, that truth was spoken and that truth cannot be hidden forever.” In their writings, defense lawyers have also indicated that, for all its shortcomings (from their perspective), the ICTR had been an opportunity to preserve history and to tell “the untold story of the Rwanda War”<sup>14</sup> and that “disclosure requirements may be creatively used by the defense to reveal a more accurate and balanced recreation of history than would have been possible in the absence of the tribunal disclosure system.” The defense lawyer Peter Erlinder<sup>15</sup> cites, as an example, the disclosure and admission into evidence of various documents regarding alleged crimes against humanity committed by the RPF. Arguing that such documents, especially UN and U.S. Government files, would not have come into the public domain so quickly had it not been for the ICTR’s disclosure requirements, Erlinder is effectively saying that without the ICTR, the “truth” would not be known. The fact that Erlinder has established a website with access to the documents accessed via disclosure serves to drive this position home.<sup>16</sup>

The “politically motivated” defense lawyers, therefore, combined criticism of the ICTR (for perceived prosecutorial partiality) with praise for the way in which the trials, especially disclosure requirements, had enabled the preservation of a potentially exonerating “historical record” awaiting future analysis irrespective of the final legal judgment (“The judgment is not made now; the judgment will be made in the future”). This (albeit grudging) celebration of the trials by “politically motivated” defense lawyers reveals a surprising accord between those tasked with speaking on behalf of the ICTR and some of the ICTR’s most virulent critics in that both value a “historical record.” The perspective of these defense lawyers (denouncing the ICTR while simultaneously celebrating it for preserving a “historical record”) can be interpreted to argue that in spite of criticism, international criminal courts can achieve “neutrality” as regards “truth” (even in the eyes of their most virulent critics), or, alternatively, it can be interpreted to argue that the archives of such trials are open to dangerous hijacking by those who distort the “truth” of the judgment.

Irrespective of how the defense lawyer’s perspective is interpreted, the views of “politically motivated” defense lawyers alert us to the naivety of statements made on behalf of the ICTR. For example, a report written by the UN Secretariat described the ICTR’s “historical record” as a tool “for fostering reconciliation and memory”<sup>17</sup> and that “the tribunals’ efforts in gathering and categorizing large amounts of documentation ensure that history cannot be distorted later for political ends.”<sup>18</sup>

But, preventing “distortion” is not the same as prescribing a single history. It cannot be denied that, as the lawyer states above, “People will be able to read and make their own decisions in the future.” The historical record will, of course, “face a long-term state of contestation”<sup>19</sup> and may come “to symbolise dissension and disagreement.”<sup>20</sup> The position of the “politically motivated”

defense lawyers requires us to acknowledge that the “legal making of memory is seen as unsettled, rather than determinative.”<sup>21</sup> Having recognized this contestation, perhaps it may be better to embrace it. Eric Ketelaar, a former national archivist of the Netherlands and a member of the Advisory Committee on the Archives of the ICTY and ICTR argues, in the context of the ICTY, that archives never speak for themselves, rather, it is users who will determine what information they will get out of an archive. As a consequence, Ketelaar observes that “archives are never closed and never complete: every individual and every generation are allowed their own interpretation of the archive, to reinvent and reconstruct its view on and narrative of the past.”<sup>22</sup> Applying this perspective to the archives of the ICTY, Ketelaar welcomes the fact that it will be a “living archive” that will “continue to be challenged, contested, and expanded.”<sup>23</sup>

Whether or not one agrees with the positions adopted by the “politically motivated” defense lawyers regarding the history of the 1994 Rwandan genocide, their attitude towards the ICTR’s “historical record” (denouncing the ICTR but celebrating its powers of revealing and testing “history”) introduces a sorely needed dose of realism to balance naïve claims regarding the value of “historical records” generated by international trials. Dissent is inevitable. The question is how to manage it?

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## Notes

- <sup>1</sup> United Nations, *Security Council Resolution 1996* (New York: United Nations, 2010).
- <sup>2</sup> United Nations, *Address to the United Nations General Assembly by the President of the ICTR 13th Annual Report of the ICTR* (New York: United Nations, 2009), 2.
- <sup>3</sup> Timothy Gallimore, "The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda," *New England Journal of International and Comparative Law* 14, no. 2 (2008): 239-263, 258.
- <sup>4</sup> Sir Hartley Shawcross was the British Attorney General and Chief Prosecutor for the United Kingdom at the Nuremberg International Military Tribunal (Major War Criminals). International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1947), 594.
- <sup>5</sup> Airey Neave was the Assistant Secretary of the Nuremberg International Military Tribunal (Major War Criminals). Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals* (London, Hodder and Stoughton, 1978), 356.
- <sup>6</sup> Gideon Hausner, *Justice in Jerusalem* (London: Nelson, 1967), 292.
- <sup>7</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth: Penguin 1994[1963]), 253.
- <sup>8</sup> Jenia Iontcheva Turner, "Defense Perspectives on Law and Politics in International Criminal Trials," *Virginia Journal of International Law* 48, no. 3(2008): 529-594, 368.
- <sup>9</sup> Nigel Eltringham "'We are not a Truth Commission': Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda," *Journal of Genocide Research* 11, no. 1 (2009): 55-79.
- <sup>10</sup> Austin Sarat and Thomas R. Kearns, "Writing History and Registering Memory," in *History, Memory and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor, Mich.: University of Michigan Press, 2002), 12.
- <sup>11</sup> Timothy Gallimore, "The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda," *New England Journal of International and Comparative Law* 14, no. 2 (2008): 239-63, 255.
- <sup>12</sup> Danny Hoffman, "The meaning of a militia: Understanding the civil defence forces of Sierra Leone," *African Affairs* 106, no. 425 (2007): 639-662, 640.

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- <sup>13</sup> Nigel Eltringham, “‘When We Walk Out; What Was it All About?’: Views on ‘New Beginnings’ from within The International Criminal Tribunal for Rwanda,” *Development and Change* 45, no. 3 (2014): 543-64.
- <sup>14</sup> Peter Erlinder, *Preventing the Falsification of History: An Unintended Consequence of ICTR Disclosure Rules?* (The Hague: ICTR: An Independent Conference on its Legacy from the Defence Perspective, 2009), 20.
- <sup>15</sup> Lead Defence Counsel for Aloys Ntabakuze in Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva Case No. ICTR-98-41-T (Military I).
- <sup>16</sup> <http://www.rwandadocumentsproject.net/gsdll/cgi-bin/library>
- <sup>17</sup> United Nations, Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanisms for the Tribunals (New York, United Nations, 2009), para 245.
- <sup>18</sup> United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (New York, United Nations, 2011), para 28.
- <sup>19</sup> David Kaye, “Archiving Justice: Conceptualizing the Archives of the United Nations International Criminal Tribunal for the former Yugoslavia,” *Archival Science* 14, no. 3 (2014): 381–396, 392.
- <sup>20</sup> Kirsten Campbell, “The Laws of Memory The ICTY, the Archive, and Transitional Justice,” *Social and Legal Studies* 22 (2013): 247-69, 258
- <sup>21</sup> Ibid.
- <sup>22</sup> Eric Ketelaar, “Truths, Memories and Histories in the Archives of the International Criminal Tribunal for the Former Yugoslavia,” in *The Genocide Convention: The Legacy of 60 Years*, ed. Harmen Wilt et al. (Leiden: Brill, 2012), 210.
- <sup>23</sup> Ibid.